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In The

Supreme Court of the United States

October Term, A. D. 1949.

No. 553

JOSEPH SIC, Petitioner,

V.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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In The

Supreme Court of the United States

October Term, A. D. 1949.

No. .....

JOSEPH SIC, PETITIONER,

V.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DON W. STEWART,
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1412 Sharp Building,
Lincoln, Nebraska,
Counsel for Petitioner.

To the Honorable the Supreme Court of the United States:

Your petitioner, Joseph Sic, respectfully petitions this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

SUMMARY AND STATEMENT OF THE MATTER INVOLVED.

Respondent has denied petitioner the right to deduct on his United States Individual Income Tax return, part of the loss petitioner sustained upon the sale of a farm (R.7).

There is no dispute as to the facts and the case was heard by the Tax Court upon a stipulation of facts (R.9,11). Petitioner, at the time, was a farmer. In 1942 he sold one of his farms at a substantial loss. In his 1942 income tax return he deducted that loss to the extent of his income for the year and in his 1943 return he deducted the remainder of the loss, which deduction was subsequently disallowed by Respondent. It is stipulated that if the loss on the sale of the farm was a net operating loss "attributable to the operation of a trade or business regularly carried on by the taxpayer", then petitioner is entitled to a deduction of $3364.93 on his 1943 return (R.10, 12).

Petitioner claims that a taxpayer's loss on the sale of an asset which has been used in a business regularly carried on by him is a loss "attributable to the operation of a trade or business regularly carried on" by him. Respondent asserts that it is not (R.13). There is no other question.

The Tax Court of the United States held for the Respondent (R.15) and the decision of the Tax Court was affirmed by the Court of Appeals for the Eighth Circuit (R.30). Petitioner's Petition for Rehearing was denied by the Court of Appeals (R.32).

JURISDICTION.

It is contended that the Supreme Court has jurisdiction to review the judgment by virtue of Section 1254 (1), Judicial Code (June 25, 1948, c. 646, 62 Stat. 928, 28 USCA 1254). Judgment was entered by the United States Court of Appeals for the Eighth Circuit on October 28, 1949 (R.30).

As stated and discussed below (under "Reasons Relied Upon For Allowance Of The Writ"), the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

THE QUESTION PRESENTED.

Whether respondent is correct in construing Section 122 (d) (5), Internal Revenue Code, so as to disallow the deduction of loss sustained by a taxpayer on the sale of an asset used in his business, as being a loss "Not attributable to the operation of a trade or business regularly carried on."

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

(1) The Court of Appeals has in this case decided an important question of federal law, which has not been, but should be, settled by this Court. The Court of Appeals has construed Section 122 (d) (5) of the Internal Revenue Code in such a way as to deny a taxpayer the right to deduct as a net operating loss

deduction, a loss incurred on the sale of an asset used in a trade or business regularly carried on by him. The effect is to deny this deduction to other individual taxpayers who sell an asset used in their business. Whether this is proper is a question of great importance to such taxpayers and should be decided by this Court.

Since the Respondent promulgated IT 3711, (1945 Cum. Bull. 162), in which he interpreted Section 122 (d) (5), Internal Revenue Code, as described above, several taxpayers have challenged the correctness of his interpretation in the courts. *Sic* v. *Commissioner of Internal Revenue* appears to have been the first of such cases in the Tax Court, and the Tax Court's opinion in the Sic case has been cited in a number of opinions in subsequent cases.

In *Lazier* v. *U. S.*, 170 F. (2d) 521, the Court of Appeals for the Eighth Circuit indicated an uncertainty as to the correctness of the Commissioner's interpretation, although it did uphold it, saying:

> "It is possible that the Commissioner, the Tax Court and the District Courts, which have approved the Commissioner's interpretation of the statute, may have misconceived the intent of Congress with respect to the character of net losses which could be carried forward or back. No doubt, that intent could have been expressed in simpler and more understandable language. This Court, however, would not be justified in adopting the construction urged upon it by the taxpayer unless convinced that the statute has thus far been misconstrued by the taxing authorities and by the courts."

The court in the same case alluded to the importance of the question:

> "Counsel for the taxpayer has stressed in his brief the nation-wide interest of taxpayers in the question involved in this case. A petition for certiorari to the Supreme Court should enable that Court to give the question nation-wide repose."

In *Dehail* v. *U. S.*, (Dist. Ct. So. Dist. of Calif., decided Sept. 13, 1949), a reluctance to uphold the Commissioner's interpretation is manifested, the court saying:

> "While there is considerable cogency in plaintiff's argument in that it is difficult to see how a person could 'operate' a business of collecting rentals without owning property which produced them and which he might in 'operating' his business see fit to sell, I nevertheless feel constained to follow *Lazier* v. *U. S.*, 8th Circuit, 170 Fed. (2d) 521 (11-10-48). Perhaps an examination of the question by the U. S. Court of Appeals for the 9th Circuit will posture the matter to enable a review by the Supreme Court."

Thus, the courts themselves in at least two recent cases, have indicated the importance of the question and the desirability of an answer to it by this Court.

(2) The judgment of the Court of Appeals decides a federal question in a way probably in conflict with applicable decisions of this Court. The decision of the Court of Appeals in this case is contrary to its earlier decision in *Washburn* v. *Commissioner of Internal Revenue,* 51 F. (2d) 949, which case was dis-

cussed at length, although distinguished, by the Circuit Court of Appeals for the Second Circuit in *Dalton* v. *Bowers*, 56 F. (2d) 16. The Circuit Court's decision in *Dalton* v. *Bowers* was affirmed by this Court. 287 U. S. 404.

For these reasons it is respectfully submitted that this petition should be granted.

DON W. STEWART,
Counsel for Petitioner.

In The

Supreme Court of the United States

October Term, A. D. 1949.

No. .....

JOSEPH SIC, PETITIONER,

V.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS.

The opinion of the Court of Appeals, Eighth Circuit, filed October 28, 1949, is reported in 177 F. (2d) 469, and is in the record (R.27). The opinion of the Tax Court, filed June 10, 1948, is reported in 10 TC 1096 and is in the record (R.10).

II.

JURISDICTION.

The date of the judgment to be reviewed is October 28, 1949.

The statutory provision believed to sustain the jurisdiction of this Court is Section 1254 (1), Judicial Code (June 25, 1948 c. 646, 62 Stat. 928, 28 USCA 1254). The Court of Appeals has in this case decided an important question of federal law which has not been, but should be, settled by this court.

III.

STATEMENT OF THE CASE.

Respondent has denied petitioner the right to deduct on his United States Individual Income Tax return part of a loss petitioner sustained upon the sale of a farm (R.7).

As is pointed out in the accompanying petition, there is no dispute as to the facts and the case was heard by the Tax Court upon a stipulation of facts (R.9,11). Petitioner, a farmer, in 1942 sold one of his farms at a substantial loss and deducted the loss in his 1942 income tax return to the extent of his income for that year. In his 1943 return he deducted the remainder of the loss, and this deduction was subsequently disallowed by Respondent. It is stipulated that if the loss on the sale of the farm was a net operating loss "attributable to the operation of a trade or business regularly carried on by the taxpayer", then petitioner is entitled to a deduction of $3364.93 on his 1943 return (R.10,12).

Petitioner claims that a taxpayer's loss on the sale of an asset used in a business regularly carried on by him is a loss "attributable to the operation of a trade or business regularly carried on" by him. Re-

spondent asserts that it is not (R.13). There is no other question.

The Tax Court of the United States held for the Respondent (R.15) and the decision of the Tax Court was affirmed by the Court of Appeals for the Eighth Circuit (R.30). Petitioner's Petition for Rehearing was denied by the Court of Appeals (R.32).

IV.

ERRORS RELIED UPON.

Whether Respondent is correct in construing Section 122 (d) (5), Internal Revenue Code, so as to disallow the loss sustained by a taxpayer on the sale of an asset used in his business as a loss "not attributable to the operation of a trade or business regularly carried on."

V.

SUMMARY OF ARGUMENT.

A. The Court of Appeals has erroneously construed Section 122 (d) (5), Internal Revenue Code, in such a manner as to deny an individual taxpayer the right to deduct as a net operating loss deduction a loss incurred on the sale of an asset used in a trade or business regularly carried on by the taxpayer.

B. The Court of Appeals has erroneously construed Section 122 (d) (5), Internal Revenue Code, in a way probably in conflict with applicable decisions of this Court.

VI.

ARGUMENT.

A.

The Court of Appeals has Erroneously Construed Section 122 (d) (5), Internal Revenue Code, in Such a Manner as to Deny an Individual Taxpayer the Right to Deduct as a Net Operating Loss Deduction, a Loss Incurred on the Sale of an Asset Used in a Trade or Business Regularly Carried On.

Section 122 (d) (5) of the Internal Revenue Code reads:

> "Deductions otherwise allowed by law not attributable to a trade or business regularly carried on by the taxpayer shall (in the case of a taxpayer other than a corporation) be allowed only to the extent of the gross income not derived from such trade or business * * *."

Petitioner contends that loss on the sale of an asset used for many years in his regular business is a loss attributable to a trade or business regularly carried on by him and that deduction of the loss thereon from his total income is therefore not barred by Section 122 (d) (5). Respondent contends that such a loss is not attributable to the operation of a trade or business regularly carried on and that 122 (d) (5) therefore prohibits the deduction claimed. There is no question of fact; it is stipulated that petitioner was a farmer and that the loss sustained was from the sale of one of the farms he personally operated.

Respondent contends that a correct interpretation of the section requires that a taxpayer be in the business of buying and selling assets of the type on which the loss was sustained in order for the loss to be attributable to the operation of the business regularly carried on. This contention is embodied in IT 3711 (1945 Cum. Bull. 162). A decision of the Board of Tax Appeals, *Slack* v. *Commissioner,* 35 B. T. A. 271, is relied upon by respondent as authority for his contention, but a study of the opinion in the Slack case shows that it involved an entirely different section of the Internal Revenue Code and is not proper authority for IT 3711.

The Tax Court, in upholding the Commissioner's action, made no mention of the Slack case, but relied in its opinion on the case of *Merrill* v. *Commissioner,* 9 T. C. 291, 173 F. (2d) 310, and on the case of *Dalton* v. *Bowers,* 56 F. (2d) 16, 287 U. S. 404. However, neither of these cases involved the sale of an asset used in a business regularly carried on. Merrill involved the sale of an interest in a partnership and Dalton involved the sale of stock in a corporation.

The Court of Appeals, in affirming the Tax Court, relied on *Lazier* v. *U. S.,* 170 F. (2d) 521, a case involving the same question as that involved in the case at bar, and decided by the Court of Appeals for the Eighth Circuit in 1948. However, the record, the briefs, and the opinion of the court in the Lazier case make no mention of *Washburn* v. *Commissioner,* 51 F. (2d) 949, an earlier decision of the Eighth Circuit Court, the facts of which case were analogous to those in the Lazier case and in this case. The

Court of Appeals followed its decision in the Lazier case. It disposed of the Washburn case by stating that it was decided under a different statute, which is true but immaterial, as was pointed out in the Petition for Rehearing (R.31).

The Washburn case should control not only because it is a logical and realistic interpretation of the statute involved, but also because it has been before this Court indirectly, as pointed out under "B" below.

That loss on the sale of an asset used in a business regularly carried on is a loss attributable to the business should be apparent. The reliance of the respondent and the courts on the language used in decisions involving different situations to support a contrary interpretation is erroneous. The tendency of other courts to follow the court's misconstruction of an important question of federal law, as referred to above, emphasizes the importance of review by this Court. This Court should decide the question so that it will not be necessary for opinions to say, as that in *Dehail* v. *U. S.*, (U. S. District Court, Southern District of California, decided September 13, 1949) did, " * * * I nevertheless feel constrained to follow *Lazier* v. *U. S.*, * * * Perhaps an examination of the question by the U. S. Court of Appeals for the 9th Circuit will posture the matter to enable a review by the Supreme Court."

B.

The Court of Appeals has Erroneously Construed Section 122 (d) (5), Internal Revenue Code, in a Way Probably in Conflict with Applicable Decisions of this Court.

In *Dalton* v. *Bowers*, supra, the taxpayer sold corporate stock he owned at a loss and claimed it as a net operating loss. The Commissioner disallowed the deduction because it was not a loss resulting from the operation of a trade or business regularly carried on by the taxpayer. The taxpayer, in his appeal to the Circuit Court of Appeals for the Second Circuit, apparently argued that *Washburn* v. *Commissioner*, supra, sustained his contention. At any rate, the opinion of the Circuit Court discusses the Washburn case at some length. The Circuit Court affirmed the disallowance of the deduction to Dalton after distinguishing the Washburn case. It pointed out, quite correctly, that Washburn was in the business of owning and managing corporations, that when he sold his stock in one such corporation, it was the sale of an asset used in a business regularly carried on by him, that this was not true of Dalton, and that therefore he was not entitled to the deduction of his loss as a net operating loss deduction.

The decision of the Circuit Court of Appeals in *Dalton* v. *Bowers* was reviewed by this Court and the decision of the Circuit Court affirmed 287 U. S. 404. Thus the Washburn case has, indirectly been before this Court.

VII.

CONCLUSION.

The single question involved in this case is of far reaching importance to individual taxpayers. The effect of the court's construction of the section of the Internal Revenue Code involved is to deny individual taxpayers a right given them by Congress. The section should be construed by this Court, both to correct the erroneous construction now placed on it, and to eliminate the need for decisions which, like *Dehail* v. *U. S.*, say: "While there is considerable cogency in plaintiff's argument * * * I nevertheless feel constrained to follow *Lazier* v. *U. S.* * * *."

Respectfully submitted,

DON W. STEWART,
Counsel for Petitioner.